Supreme Court, U. S.
FILED
OCT 18 1976
MICHAEL RODAK, JR., CLERK

No. 76-261

In the Supreme Court of the United States

OCTOBER TERM, 1976

TOM R. ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA AND
SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. A1-A3) is reported at 534 F. 2d 1134. The district court rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1976. A timely petition for rehearing was denied on July 30, 1976 (Pet. App. B1). The petition for a writ of certiorari was filed on August 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a conviction for criminal contempt for violation of a consent order of injunction was invalid because

the district court, before entering the injunction, failed to inquire whether the petitioner was represented by counsel and consented to the injunction knowingly and willfully, and to advise petitioner of the consequences of and penalties for violating the injunction.

STATUTES INVOLVED

Section 20(b) of the Securities Act of 1933, 48 Stat. 86, as amended, 15 U.S.C. 77t(b), Section 21(d) of the Securities Exchange Act of 1934, as amended by Pub. L. 94-29, 89 Stat. 154, 15 U.S.C. (Supp. V) 78u(d), and 18 U.S.C. 401 are set forth in the Appendix hereto.

STATEMENT

In August 1971, the Securities and Exchange Commission filed a complaint in the United States District Court for the Northern District of Texas against Capital Oil Corporation, petitioner and 14 other individual defendants, charging the defendants with violations of the antifraud[1] and registration[2] provisions of the federal securities laws and seeking permanently to enjoin the defendants from further violations[3] (A. 80-94).[4]

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[1]Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5.

[2]Section 5(a) and (c) of the Securities Act, 15 U.S.C. 77e(a) and (c), and Section 15(a) of the Securities Exchange Act, 15 U.S.C. 78o(a).

[3]*Securities and Exchange Commission* v. *Capital Oil Corporation, et al.*, N.D. Tex., Civil Action No. CA3-5027-A.

[4]"A." refers to pages of the appendix in the court of appeals, a copy of which has been lodged with this Court.

Without admitting or denying the allegations in the complaint, petitioner in 1972 consented to the permanent injunction on the advice of attorneys who also represented the other defendants. Although the Commission had advised petitioner that a potential conflict of interest existed between him and other defendants represented by his attorneys (Pet. 4), petitioner nevertheless specifically agreed to be represented by those attorneys (A. 106).[5]

In April, 1975, the United States filed a two-count information (A. 1-3) in the same court,[6] charging that petitioner had knowingly disobeyed the order, and was therefore in willful contempt of it, in violation of 18 U.S.C. 401. Petitioner, represented by new counsel, moved to dismiss the criminal contempt proceeding (A. 12-14). He questioned, *inter alia*, the power of a federal district court to utilize, in the context of the federal securities laws, criminal contempt to punish violations of its injunctions. Petitioner argued that before criminal sanctions could be imposed upon him for contempt of an injunction against violations of the securities laws, the Commission must refer the case to the Department of Justice and a grand jury must indict him (A. 13-14).

Petitioner then moved in both the injunctive and contempt actions to set aside the injunction previously entered, claiming he had been deprived of the right to effective counsel because his attorneys also represented other defendants in the Commission's case and he was not

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[5]It is not clear whether petitioner now contends that his attorneys were in fact disqualified by reason of some conflict of interest. Although the petition implies such a contention, petitioner offers no basis for concluding that a conflict in fact existed. In its opinion, the court of appeals stated that "[t]he conflict of interest here was at most a potential one, since no actual prejudice was shown" (Pet. App. A2).

[6]*United States* v. *Tom R. Rogers*, N.D. Tex., Criminal No. CR 3-75-145.

advised "that a conflict of interest existed between the various parties" represented by the same counsel or of his "potential criminal jeopardy" (A. 25-26).

After being informed of his right to a jury trial and of the possible penalties involved (A. 38-39), petitioner pleaded guilty to one count of the information (A. 39-41, 68), subject to the "jurisdictional" question he had raised. The other count of the information was dismissed on the motion of the United States Attorney (A. 66, 68), and, on the remaining count, petitioner was sentenced to five years imprisonment, six months of which were to be served in a jail-type institution and the remainder on probation (A. 62, 68). A further condition of the probation was that petitioner refrain from dealing in securities (A. 68).

Subsequently, the courts in the respective injunction and contempt actions refused to set aside the injunction (A. 71, 105-106).

The court of appeals for the Fifth Circuit affirmed both the injunctive order and the contempt conviction (Pet. App. A1-A3, B1).

ARGUMENT

Petitioner urges that this Court, in the exercise of its supervisory power, should require district courts, before entering consent orders of permanent injunctions in Commission civil actions, to inquire whether the defendants are represented by counsel and have consented to the injunction knowingly and willfully, and should advise defendants that violations of the injunction will subject them to criminal contempt without a reference of the matter to the Department of Justice or indictment by a grand jury. Petitioner also seeks reversal of his conviction on the criminal contempt charges, to which he pled guilty, on the ground that the district court did not

make such inquiries and statements when the injunctive order which he subsequently violated was entered.

Petitioner does not press the claim, which he made in the courts below, that his contempt conviction is invalid because there was no reference of the matter to the Department of Justice and no grand jury indictment. The court of appeals correctly rejected that claim. *Green* v. *United States*, 356 U.S. 165, 183-185; *United States* v. *Bukowski*, 435 F. 2d 1094 (C.A. 7), certiorari denied, 401 U.S. 911; *Yates* v. *United States*, 316 F. 2d 718, 722-723 (C.A. 10). Rather, petitioner seems to contend that his contempt conviction was invalid because, he alleges, he was inadequately represented by counsel in the injunctive proceeding and because he was not aware or informed that violations of the injunctive order would subject him to criminal liability for contempt. Neither contention is well founded.

1. Petitioner was not deprived of any constitutional or statutory right to counsel in the injunctive proceeding. As the court of appeals stated, an injunctive proceeding is a civil action to which the Sixth Amendment right to counsel does not apply (Pet. App. A2). *Securities and Exchange Commission* v. *MacElvain*, 417 F. 2d 1134, 1138 (C.A. 5), certiorari denied, 397 U.S. 972. Moreover, while 5 U.S.C. 555(b) provides a right to counsel to any "person compelled to appear in person before an agency or representative thereof * * *," petitioner was not compelled to appear before the Commission when he consented to the injunctive order.

In any event, petitioner was represented by counsel in the injunctive proceeding. Although subsequent events have made him regret the advice of that counsel, he offers no basis other than his own dissatisfaction for concluding that his counsel was ineffective in any

constitutional sense or was disqualified by conflict of interest. As the court of appeals noted, the conflict was "at most a potential one" (Pet. App. A2). Petitioner admits that the Commission advised him of a potential conflict, and the district court found that, notwithstanding that advice, "[h]e specifically agreed to be represented by [his attorneys]" (A. 106).

In any event, any alleged defects in the injunctive order do not affect petitioner's conviction for contempt of that order, as petitioner himself appears to concede (Pet. 6). The court of appeals correctly held that (Pet. App. A2):

> [T]he validity of the order he disobeyed was not open to question in the contempt proceeding. *U.S.* v. *United Mine Workers*, 330 U.S. 258, 67 S. Ct. 677, 91 L. Ed. 884 (1947); *U.S.* v. *Leyva*, 513 F. 2d 774, 776 C.A. 5, 1975).

2. Petitioner's claim that he was not aware or informed that violations of the consent order would expose him to criminal liability furnishes no basis for reversing his conviction. If petitioner was in fact ignorant that his conduct was criminally punishable, such ignorance is not a defense under well established principles. See, *e.g.*, *United States* v. *International Minerals Corp.*, 402 U.S. 558, 563. Indeed, having consented in writing to a court order enjoining him from specific conduct, petitioner was at least as much on notice as to the consequences of his conduct as most other persons charged with criminal violations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DAVID FERBER,
Solicitor to the Commission,
Securities and Exchange Commission.

OCTOBER 1976.

APPENDIX

Section 20(b) of the Securities Act of 1933, 48 Stat. 86, as amended, 15 U.S.C. 77t(b), provides:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the United States District Court for the District of Columbia to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceeding under this title. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the District wherein such prospectus or security is received.

Section 21(d)* of the Securities Exchange Act of 1934, as amended by Pub. L. 94-29, 89 Stat. 154, 15 U.S.C. (Supp. V) 78u(d), provides:

> Wherever it shall appear to the Commission that any person is engaged or is about to engage in acts or

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*Prior to June 4, 1975, when the Securities Acts Amendments of 1975, Pub. L. 94-29, 89 Stat. 97, became effective, the relevant provisions were contained in Section 21(e) of the Act, 48 Stat. 900, as amended, 15 U.S.C. 78u(e), and read as follows:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title.

> practices constituting a violation of any provision of this title, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this title or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title.

18 U.S.C. 401 provides in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
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> * * * * *
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> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.